Public Prosecutor v Joehari bin Abdullah & Anor

HIGH COURT (LABUAN) — CRIMINAL APPEAL NO K41-07-95
TEE AH SING JC
10 FEBRUARY 1996

Criminal Law *— Penal Code (Malaysia) — ss 381 & 34 — Theft by servant — Common intention — Whether common intention proved*

Criminal Law *— Penal Code (Malaysia) — ss 414 & 34 — Voluntarily assisting in disposal of stolen property — Time of commission of crime — Whether prima facie case made out against both respondents*

Criminal Procedure *— Charge — Alteration or amendment of — Original charge not made out — Evidence nevertheless makes out prima facie case of commission of crime — Whether magistrate should amend charge — Criminal Procedure Code (FMS Cap 6) s 173(h)*

Both the respondents were employees of Jabatan Kerja Raya and were jointly charged in the magistrate's court for an offence of theft in respect of two Robin hand compactors (exhs P4 and P5) in the possession of their employer, under s 381 read together with s 34 of the Penal Code (FMS Cap 45) ('the Penal Code'), and in the alternative, for voluntarily assisting in disposing of the allegedly stolen property under s 414 read with s 34 of the Penal Code. In his evidence, PW4 stated that he was on guard duty on 29 April 1991 from 6pm to 12am. However PW4 did not go on his rounds for the period between 11pm to 11.45pm due to the heavy rain. Subsequently at 11.45pm, PW4 discovered that a break-in had occurred. PW5 in his evidence confirmed the loss of exhs P4 and P5 on 30 April 1991 and lodged a police report on the same day. PW9 from whom the respondents had borrowed money, later testified that exhs P4 and P5 were given to him by the respondents as security for a loan of RM1,200. PW9 could not remember the date of the transaction but could recall that it was past 12am and the respondents were drenched as it was raining. PW9 then lent exhs P4 and P5 to his brother (PW7) sometime at the end of May 1991. PW7 later brought exhs P4 and P5 to the police station. The pick-up driver who helped PW7 carry exhs P4 and P5 was not called by the prosecution. There were two grounds of appeal: (a) that the learned magistrate had erred in fact and in law in holding that the prosecution had failed to prove common intention; (b) that the learned magistrate had erred in fact and in law in deciding that the prosecution had failed to reconcile the time of the incident to point to the guilt of the accused for theft. Learned counsel for the respondents submitted that on the facts of the case there was a pick-up driver who carried exhs P4 and P5 but was not called and that this was fatal to the prosecution's case.

Held, allowing the appeal:

(1) From the acts and conduct of both the respondents and the relevant circumstances of the case, it could be inferred that the prosecution had proved common intention on the part of both the respondents in voluntarily assisting in disposing of stolen property (see p 330H).

(2) From the evidence, the prosecution had proved that exhs P4 and P5 were stolen between 11pm and 11.45pm on 29 April 1991 and 12am on 31 May 1991. The offence of voluntarily assisting in disposing of exhs P4 and P5 was also committed during that period (see p 332D–E).

(3) The prosecution had made out a prima facie case against both respondents in respect of the disposal of exhs P4 and P5. Although the evidence did not support the alternative charge as drawn, under s 173(h) of the Criminal Procedure Code (FMS Cap 6), the magistrate had a duty to amend the charge based on the evidence adduced by the prosecution (see pp 332E–333A); *Mohamed Yusof v PP* [1962] MLJ 311 and *PP v Tan Kim Kang & Ors* [1962] MLJ 388 followed.

(4) Considering the amended alternative charge, the prosecution had made out a prima facie case against both respondents in respect of the alternative charge of disposing of stolen property which, if unrebutted, would warrant their convictions (see p 333E–F).

(5) The failure to call the pick-up driver was not fatal to the prosecution's case. The pick-up driver was the one who had helped PW7 carry exhs P4 and P5 from the jetty to the police station. The pick-up driver was not involved in this case. What was important was that PW7 identified exhs P4 and P5 as the hand compactors he had borrowed from PW9 and PW9 stated that exhs P4 and P5 were borrowed by PW7. There was therefore no break in the chain of evidence regarding exhs P4 and P5 (see p 334A–B).

[Bahasa Malaysia summary

Kedua-dua penentang adalah pekerja Jabatan Kerja Raya dan telah dituduh bersama di mahkamah majistret untuk kesalahan mencuri two buah 'hand compactor' Robin (ekshibit P4 dan P5) dalam milikan majikan mereka, di bawah s 381 dibaca bersama dengan s 34 Kanun Keseksaan (NMB Bab 45) ('Kanun Keseksaan'), dan secara alternatifnya, untuk kesalahan secara rela menjual harta yang dikatakan telah dicuri, di bawah s 414 dibaca bersama dengan s 34 Kanun Keseksaan. Mengikut keterangannya, PW4 telah menyatakan bahawa dia telah bertugas mengawal pada 29 April 1991 dari 6 petang sehingga 12 malam. Walau bagaimanapun PW4 tidak melakukan

rondaannya untuk tempoh masa di antara 11 malam sehingga 11.45 malam disebabkan hujan lebat. Kemudiannya pada 11.45 malam, PW4 mendapati bahawa suatu pecah masuk telah berlaku. PW5 dalam keterangannya telah mengesahkan kehilangan ekshibit P4 dan P5 pada 30 April 1991 dan telah membuat laporan polis pada hari yang sama. PW9, orang yang telah meminjamkan wang kepada penentang-penentang, kemudiannya telah memberi keterangan bahawa ekshibit P4 dan P5 telah diberikan kepadanya oleh penentang sebagai cagaran untuk pinjaman RM1,200. PW9 tidak dapat mengingati tarikh transaksi tersebut tetapi dapat mengingati bahawa ianya telah melebihi 12 malam dan penentang telah basah disebabkan hujan. PW9 kemudiannya telah meminjamkan ekshibit P4 dan P5 kepada adiknya (PW7) lebih kurang pada akhir bulan Mei 1991. PW7 kemudiannya telah membawa ekshibit P4 dan P5 ke balai polis. Pemandu pengangkut yang telah menolong membawa ekshibit P4 dan P5 tidak dipanggil oleh pihak pendakwa. Terdapat dua alasan rayuan: (a) bahawa majistret yang arif adalah salah di sisi undang-undang dan fakta dalam memutuskan bahawa pihak pendakwa telah gagal membuktikan niat bersama; (b) bahawa majistret yang arif adalah salah di sisi undang-undang dan fakta dalam memutuskan bahawa pihak pendakwa telah gagal menetapkan masa kejadian tersebut untuk menunjuk arah kepada kesalahan penentang untuk pencurian. Peguambela bagi penentang telah menghujahkan bahawa atas fakta kes terdapat pemandu pengangkut yang telah membawa ekshibit P4 dan P5 tetapi dia tidak dipanggil dan ini telah menjejaskan kes pendakwa.

Diputuskan, membenarkan rayuan tersebut:

(1) Berdasarkan fakta-fakta dan tindakan kedua-dua penentang dan keadaan kes yang relevan, ianya dapat disimpulkan bahawa pihak pendakwa telah membuktikan niat bersama kedua-dua penentang dalam secara rela menolong menjual harta yang telah dicuri (lihat ms 330H).

(2) Berdasarkan keterangan, pihak pendakwa telah membuktikan bahawa ekshibit P4 dan P5 telah dicuri di antara 11 malam dan 11.45 malam pada 29 April 1991 dan 12 malam pada 31 Mei 1991. Kesalahan menolong secara rela menjual ekshibit P4 dan P5 juga telah dilakukan pada tempoh masa tersebut (lihat ms 332D–E).

(3) Pihak pendakwa telah mendirikan satu kes prima facie terhadap kedua-dua penentang berkaitan dengan jualan ekshibit P4 dan P5. Walaupun keterangan tidak menyokong tuduhan alternatif seperti yang disediakan, di bawah s 173(h) Kanun Acara Jenayah (NMB Bab 6), majistret mempunyai tugas meminda tuduhan berdasarkan keterangan yang dikemukakan oleh pihak pendakwa (lihat ms 332E–333A); *Mohamed Yusof v PP* [1962] MLJ 311 dan *PP v Tan Kim Kang & Ors* [1962] MLJ 388 diikut.

(4) Mempertimbangkan tuduhan alternatif seperti yang dipinda, pihak pendakwa telah mendirikan satu kes prima facie terhadap kedua-dua penentang berkaitan dengan tuduhan alternatif menjual harta yang telah dicuri yang, jika tidak disangkal, akan menjustifikasikan sabitan penentang (lihat ms 333E–F).

(5) Kegagalan memanggil pemandu pengangkut tidak menjejaskan kes pihak pendakwa. Pemandu pengangkut adalah orang yang telah menolong PW7 membawa ekshibit P4 dan P5 dari jeti ke balai polis. Pemandu pengangkut tersebut tidak terlibat dalam kes ini. Apa yang penting adalah bahawa PW7 telah mengenal pasti ekshibit P4 dan P5 sebagai 'hand compactors' yang telah dipinjamnya dari PW9; dan PW9 telah menyatakan bahawa ekshibit P4 dan P5 telah dipinjam oleh PW7. Maka tidak ada keleraian dalam sambungan keterangan berkaitan dengan ekshibit P4 dan P5 (lihat ms 334A–B).]

Notes

For cases on theft by servant, see 4 *Mallal's Digest* (4th Ed) paras 922–928.

For cases on voluntarily assiting in disposing of stolen property, see 4 *Mallal's Digest* (4th Ed) 1094–1099.

For cases on alternative or amendment of charges, see 5 *Mallal's Digest* (4th Ed 1994 Reissue) paras 615–656.

For cases on adverse inference, see 7 *Mallal's Digest* (4th Ed 1995 Reissue) paras 83–97.

Cases referred to

Abu Bakar v PP [1947] MLJ 133
Dato' Mokhtar Hashim v PP [1983] 2 MLJ 232
Khoo Hi Chiang v PP [1994] 1 MLJ 265
Mahbub Shah v King Emperor AIR 1945 PC 118
Mohamed Yusof v PP [1962] MLJ 311
PP v Jessa Singh [1940] MLJ 56
PP v Tan Kim Kang & Ors [1962] MLJ 388
Ti Chuee Hiang v PP [1995] 2 MLJ 433

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 153, 173(h)
Penal Code (FMS Cap 45) ss 34, 381, 414

Mahmud Hj Abdullah (Deputy Public Prosecutor) for the public prosecutor.

Rakhbir Singh (*Rakhbir Singh & Co*) for the respondents.

Cur Adv Vult

Tee Ah Sing JC: This is an appeal by the prosecution against the acquittal and discharge of both respondents after the close of the case for the

prosecution without their defences being called. Both respondents were tried jointly as follows: A

Charge

That you all are jointly charged and the charge against you all is as follows:

'That you all, on or about the 29 April 1991 at about 8.30pm, at the JKR Store, along Jalan Rancha Rancha, in the Federal Territory of Labuan, in furtherance of the common intention of you all, being a servant of Jabatan Kerja Raya, committed theft by stealing property, to wit 2 (two) Robin hand compactors, in the possession of the said JKR, and thereby committed an offence punishable under s 381 and read with s 34 of the Penal Code.' B C

Alternative charge

That you all, on or about the 29 April 1991 at about 10.30pm, at Tan Villa, Tanjong Aru, in the Federal Territory of Labuan, in furtherance of the common intention of you all, voluntarily assisted in disposing of property, to wit 2 (two) Robin hand compactors, which you all had reason to believe to be stolen property, and that you thereby committed an offence punishable under s 414 and read with s 34 of the Penal Code. D

There are two grounds of appeal. The first ground is that the learned magistrate had erred in fact and in law in holding that the prosecution had failed to prove common intention. E

The learned deputy public prosecutor submitted that the prosecution has proved common intention for the charge under s 381 and the alternative charge under s 414 of the Penal Code (FMS Cap 45) ('the Penal Code'). In support the following were cited

(a) *Datuk Mokhtar Hashim v PP* [1983] 2 MLJ 232 at pp 267–268; F

(b) *Rattanlal & Dhirajlal's Law of Crimes* (23rd Ed) at pp 89 and 90;

(c) *Mahbub Shah v King Emperor* AIR 1945 PC 118.

Learned counsel for the respondents submitted that the prosecution had not proved common intention as required by the test in *Khoo Hi Chiang v PP* [1994] 1 MLJ 265. He also cited the case of *Abu Bakar v PP* [1947] MLJ 133 on common intention. G

I shall now deal with the question of common intention. The law as to common intention is defined in s 34 of the Penal Code which reads:

When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone. H

In *Mahbub Shah v Emperor* AIR 1945 PC 118 at p 120 their Lordships of the Privy Council said:

To invoke the aid of s 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their I

> Lordships that common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has been often observed, it is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case.

The learned magistrate in his grounds of decision (at p 160 of the record of appeal) stated that 'Despite these discrepancies, this court has also to consider the evidence of PW9 (Wong Sui Kong). According to him the first and second accused had borrowed money from him.'

And at p 161 of the record of appeal it is stated by the learned magistrate:

> Coming back to PW9's house, PW9 said he saw Rashid and Joehari and they had two compactors; 'dia bawa dua compactor datang. Compactor letak di pintu saya depan ... dia cakap itu compactor simpan sana mahu pinjam RM1,200, Joehari yang cakap' he said.

I am of the considered opinion that from what PW9 said, there was no break in chain of evidence because he said, 'Bila buka pintu saya nampak Rashid sama Joehari.'

This clearly shows that both accused persons had in their possession exhs P4 and P5 at that material time. He also said that 'masa compactor dibawa ke rumah saya malam hujan.'

It must be noted that the weather that night was consistent with the weather on the night in question. It was around past 12am and both accused persons were drenched.

At p 131 of the record of appeal PW9 stated that both the respondents came to his house that night and wanted to borrow money. They wanted to borrow RM1,200. PW9 also stated that 'Dia cakap itu compactor simpan sana mahu pinjam RM1,200, Joehari yang cakap. Saya ada kasih pinjam malam itu.'

From the grounds of decision of the learned magistrate, it is clear that he was satisfied that both respondents had in their possession exhs P4 and P5 at the material time. He also made a finding that both respondents came to PW9's house that night to borrow RM1,200. Both respondents left exhs P4 and P5 with PW9. PW9 did give the loan of RM1,200.

Thus the prosecution has proved that both respondents assisted in the disposal of exhs P4 and P5 to PW9.

In *Ratanlal & Dhirajlal's Law of Crimes* (23rd Ed) the learned authors at p 89 said:

> Section 34 has enacted a rule of co-extensive culpability when offence is committed with common intention by more than one accused. Such co-extensive culpability would be indicated by reason of actual participation, some overt act, active presence, pre-plan and preparation and eventual participation therein as well as immediate conduct after the commission of the offence.

Further, PW4 at pp 77 and 78 of the record of appeal testified: A

> Sebelum terjadi kejadian yang tertuduh ini ada bertanya pukul berapa saya duti. Yang tertuduh ini bertanya, Joehari, Rashid, Salleh pukul berapa saya kerja. Dengan ikhlas saya memberi yang tertuduh dari 6 petang sampai 12 malam. Di situlah saya sah yang tertuduh ini mencuri. Saya ditanya sebelum berlaku kejadian mencuri. Satu hari sebelum kejadian. Semasa ditanya saya di bandar. B

PW4 testified that after he informed PW5 about the incident, the two respondents and one Salleh Murin met him in the town. They gave him RM200 without any reason. When PW4 asked what it was for they just told him to take it. PW4 testified (at p 81 of the record of appeal): C

> Selepas mereka beri duit mereka bertiga ada berjumpa saya lagi. Saya tidak tahu bila masanya tetapi malam. Tidak tahu berapa lama. Sebelum mereka ditangkap polis. Dia orang ajak saya bawa ke tempat Wong.

He further stated that he was brought to PW9's house. After that the respondents and Salleh brought PW4 to the town to wait for PW9. When D PW9 arrived the respondents asked him to sign a piece of paper. At p 82 of record of appeal PW4 stated that 'Joehari tunjuk tempat untuk saya sain'.

After PW4 signed the piece of paper, he surrendered it to Salleh and the respondents and they handed it to PW9. E

In cross-examination (at p 92 of the record of appeal) PW4 said 'Ya dalam lebih dua tiga hari begitu. Dia orang cakap, "Ambil ini duit RM200"'. At p 131 of the record of appeal PW9 testified:

> Selepas itu lepas satu minggu dia tidak ada duit bayar. Dia cakap mahu ambil RM900 lagi. Selepas dia orang pergi rumah saya mahu ambil RM900 lagi. RM900 itu jam ada empat orang datang. Joehari sama Rashid. Itu dua saya tidak kenal. Joehari sama Rashid kerja Jabatan Kerja Raya. F

PW9 also stated:

> Musim mahu pinjam RM900 itu malam. Saya di rumah. Semasa di rumah nampak empat orang datang rumah. Kenal Joehari dan Rashid. Satu orang yang cerita sama saya — Joehari. Yang lain di luar pagar. Dia mahu pinjam RM900 lagi. Pasal dia pinjam mula-mula RM1,200 sama RM600 dia tidak boleh bayar. Suruh tambah RM900 itu compactor kasih saya. G

PW9 also stated that that night he did give RM900 and a voucher at the Hong Kong bank to Joehari. And later Joehari handed to him the voucher which was duly signed with the name Munap bin Latip. H

I am of the view that from the acts and conduct of both respondents and the relevant circumstances as stated above it can be inferred that the prosecution has proved common intention on the part of both respondents in voluntarily assisting in disposing of exhs P4 dan P5.

The second ground is that the learned magistrate erred in fact and in I law in deciding that the prosecution failed to reconcile the time of the incident to point to the guilt of the accused for theft.

The learned deputy public prosecutor submitted that as far as the charge against both the respondents are concerned the charges are sufficient to enable both the respondents to answer the charges. Section 153 of the Criminal Procedure Code (FMS Cap 6) ('the CPC') has been complied with.

It is none of the court's concern whether the accused will raise the defence of alibi or not. Further the learned magistrate should have exercised the powers under s 173(h) of the CPC.

On the other hand learned counsel for the respondents submitted that the learned magistrate found no evidence on the issue of time and thus the prosecution had not proved this ingredient beyond reasonable doubt. In support the case of *Khoo Hi Chiang v PP* [1994] 1 MLJ 265 was cited.

I shall now deal with the evidence adduced by the prosecution. PW4 stated in his evidence (at p 74 of the record of appeal) that on 29 April 1991 he was on guard duty from 6pm to 12am. He further stated:

> Pada jam 11 malam hujan pun turun dengan lebat saya pun tidak dapat meronda disebabkan hujan. 11.45 malam hujan pun berhenti. Saya pun startlah meronda. Semasa saya ronda di kawasan tersebut saya ternampak kerosakan pagar — dua rosak berlubang — pagar.

PW5 testified that on 30 April 1991 at about 9.38am he lodged a police report regarding the loss of two hand compactors. He confirmed that exhs P4 and P5 belonged to the JKR.

At p 130 of the record of appeal PW9 stated that 'Dia datang bawa itu compactor pergi rumah. Tidak ingat bila dibawa. Malam — 12 lebih malam.' By 'dia' PW9 has clarified that he was referring to both respondents. And at p 131 of the record of appeal PW9 further said:

> Pasal mahu pinjam duit lagi — dia orang datang. Berdiri pintu dua orang. Rashid sama Joehari. Masa itu ngam mahu tidur. Saya dengar ketuk pintu. Saya turun bawah buka pintu tengok. Bila buka saya nampak Rashid sama Joehari. Itu saya tidak tahu dia bawa dua compactor datang. Compactor letak di pintu saya depan. Lepas saya nampak dia orang — dia orang datang mahu pinjam lagi. Dia cakap itu compactor simpan sana mahu pinjam RM1,200. Joehari yang cakap. Saya ada kasih pinjam malam itu. Saya pakai cek.

At p 132 of the record of appeal PW9 said 'Lepas terima ini barang saya simpan di rumah. Ada orang yang pinjam compactor — adik saya. Pinjam dari saya bulan lima tahun 1991.' At p 133 of the record of appeal PW9 stated:

> Malam compactor dibawa ke rumah saya — malam hujan. Dia orang biasa. Dia orang kena hujan. Saya tiada tanya masa itu ini barang siapa punya. Fasal saya ngantuk sudah mahu tidur. Mereka ada bilang ini sebagai sekuriti untuk pinjam duit.

At p 126 of the record of appeal PW7 stated that he borrowed exhs P4 dan P5 from his brother (PW9) at the end of May 1991. 'Haribulan tidak

ingat. Pinjam pada hujung bulan lima tahun 1991.' He identified exhs P4 and P5 in court as the ones he borrowed from PW9. A

I am of the view that from the evidence adduced the prosecution has proved that the theft of exhs P4 and P5 had been committed on 29 April 1991 between 11pm and 11.45pm as this was the period when PW4 did not go on his rounds due to heavy rain. PW4 discovered the break in at about 11.45pm when he resumed his rounds. B

PW5 confirmed the loss of exhs P4 and P5 on 30 April 91 when he lodged the police report at 9.38am. PW9 has testified that he cannot remember the date exhs P4 and P5 were given to him by the respondents as security for the loan.

C

However PW9 said that he kept exhs P4 and P5 with him until the month of May 1991 when he lent them to his brother (PW7). PW7 stated that he borrowed exhs P4 and P5 at the end of May 1991.

Therefore the prosecution has adduced evidence to show that the P4 and P5 were stolen between 11pm and 11.45pm on 29 April 1991 and 12 am on 31 May 1991. D

In this case the prosecution has charged both respondents with the main charge and an alternative charge.

From the facts adduced by the prosecution it is clear that both respondents did voluntarily assist in disposing of stolen property, namely exhs P4 and P5. The offence of voluntarily assisting in disposing the stolen property is between 11pm and 11.45pm on 29 April 1991 and 12am on 31 May 1991. E

I am of the considered opinion that the prosecution has made out a prima facie case against both respondents in respect of the disposal of stolen property which, if unrebutted, would warrant their convictions. F

Section 173 (h) of the CPC reads as follows:

> (h) If, when such evidence has been taken, the court is of opinion that there are grounds for presuming that the accused has committed the offence charged or some other offence which such court is competent to try and which in its opinion it ought to try, it shall consider the charge recorded against the accused and decide whether it is sufficient and, if necessary, shall amend the same. G

The provision of section 173(h) was considered by the court in the following cases. In *Mohamed Yusof v PP* [1962] MLJ 311, Adams J said:

> If he found that the evidence did not support the charge as drawn he should as he is in duty bound to do under s 173(h) of the CPC have amended it so that the accused stood charged with knowingly omitting to take such order with a fire as is sufficient to guard against any probable danger to human life. H

In *PP v Tan Kim Kang & Ors* [1962] MLJ 388, Hashim J said: I

> I think a safer and better course would be to follow the provisions of s 173 (h), (i) and (j) of the CPC. It is quite clear from these three subsections that

A a president or a magistrate should make any alteration or amendment to the charge only at the close of the case for the prosecution.

Under this s 173(h) of the CPC, I am of the opinion that the learned magistrate has a duty to amend the charge based on the evidence adduced by the prosecution.

B I therefore order the learned magistrate to amend the alternative charge as follows:

> That you all, between 11pm on 29 April 1991 and 12am on 31 May 1991 at Tan Villa, Tanjong Aru in the Federal Territory of Labuan, in furtherance of the common intention of you all, voluntarily assisted in disposing of
> C property, to wit, 2 (two) Robin hand compactors, which you all had reason to believe to be stolen property and that you have thereby committed an offence punishable under s 414 of the Penal Code and read with s 34 of the Penal Code.

The learned magistrate in his grounds of decision at p 162 of the record of
D appeal said:

> The same goes for the alternative charge. While there is no doubt that the first ingredient exists, the time of disposing of the properties is in doubt. The accused could have obtained them from someone else not knowing where they came from notwithstanding the inference of dishonest intention hereinbefore mentioned.

E I am of the view that after the prosecution has closed its case it is the duty of the learned magistrate to decide whether a prima facie case has been made out which, if unrebutted, would warrant the conviction of both respondents.

In this instant case I am of the view that the prosecution has made
F out a prima facie case against both respondents in respect of the alternative charge of disposing stolen property which, if unrebutted, would warrant their convictions. Therefore it was wrong for the learned magistrate to anticipate possible defences. I can do no better then cite the case of *PP v Jessa Singh* [1940] MLJ 56 where His Lordship Murray-Aynsley J said:

G

> In this case the magistrate acquitted the respondent at the close of the case for the prosecution. I think he acted prematurely. There was evidence which if unrebutted would have justified a conviction. When the respondent has been heard it is quite possible that a satisfactory explanation may be given; but it is not part of the duty of a court at an early stage in the proceedings to anticipate possible defences, and then to act as though these
> H defences had been established.

Learned counsel for the respondents submitted that on the facts of the case there was a pick-up driver who carried the hand compactors but he was not called. And this is fatal to the prosecution's case. In support he cites the case of *Ti Chuee Hiang v PP* [1995] 2 MLJ 433.

I He also submitted that the learned magistrate noted that Inspectors Mohd Firdaus and Basli bin Lani were subpoenaed but not called. The learned deputy public prosecutor in reply submitted that there is a discretion

of the prosecution as to which witness to call and which not to call. Further the two witnesses had been offered to the defence.

I agree with the contention of the learned deputy public prosecutor that the failure to call the pick-up driver is not fatal to the prosecution's case. The pick-up driver was the one who helped PW7 carry the two hand compactors from the jetty to the police station. The pick-up driver was not involved in this case. What is important is that PW7 identified exhs P4 and P5 as the hand compactors he borrowed from PW9. And PW9 stated that exhs P4 and P5 were borrowed by PW7. There is no break in the chain of evidence regarding exhs P4 and P5.

In respect of Inspectors Mohd Firdaus and Basli bin Lani, they were offered to the defence before the prosecution closed its case. From the record of appeal it can be inferred that they are not material witnesses. As such the failure to call them as witnesses is not fatal to the prosecution case.

For the reasons given above the appeal ought to be allowed. Accordingly the learned trial magistrate is hereby directed to amend the alternative charge against the respondents and call upon both respondents to enter their defences in respect of the amended alternative charge.

Appeal allowed.

Reported by Kenneth Goh